No.: 00-151

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In the Supreme Court of the United States

United States of America, petitioner

vs.

Oakland Cannabis Buyers' Cooperative
et al., respondents

On writ of certiorari to
the United States Court of Appeals
for the Ninth Circuit

MOTION TO ALLOW FILING OF *AMICUS* BRIEF

and

AMICUS CURIAE BRIEF FOR AFFIRMANCE IN SUPPORT OF RESPONDENTS

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REQUEST FOR LEAVE TO FILE *AMICUS* BRIEF:

Sudi Pebbles Trippet hereby requests leave to file the attached *Amicus Curiae* brief in support of affirmance.

Consent has been requested from the parties. The Acting Solicitor General has consented in writing on behalf of the United States (see Appendix at A-1) but counsel for Respondents has withheld consent, giving no reasons.

Amicus Trippet believes that unless the government has a compelling federal interest in banning medical cannabis, constitutional caselaw protects its use and furnishing for bona-fide medical purposes; and that the Controlled Substances Act (CSA) must be construed so as not to conflict with those rights (or be voided insofar as it conflicts).

Amicus is one of many patients who have the right to use cannabis under California's Prop. 215 (see A-2), but do not, or might not, qualify under the necessity defense.

She uses cannabis to prevent and relieve migraine headaches, and has her physician's written recommendation for this, which is all she needs under current state law.

Amicus chooses cannabis in part because it is significantly safer than any other migraine drug; but this is not sufficient under the necessity defense as it usually is understood (and has been understood in this case) since she can't prove all other migraine drugs are unreasonably dangerous, ineffective or otherwise unavailable.

Amicus is also a member of Respondent Oakland Cannabis Buyers' Cooperative (OCBC), but like the vast majority of members she is effectively unrepresented in this case.

The case now pending in this Court is that of a few patients who are Intervenors in the underlying case, each of whom is qualified to use cannabis under both state law and the common-law necessity defense.

Their counsel argue that the CSA was not intended to exclude a necessity defense in exceptional cases like theirs.

Perhaps thinking the smallest victory is the easiest to win, they have presented arguments, mainly on statutory construction, that are calculated to benefit only the few patients with a medical "necessity" for cannabis; and they have essentially ignored all arguments that would benefit more patients, including most constitutional arguments.

Since counsel for Respondents have been unwilling to provide *Amicus* an advance draft of their brief or inform her of what they plan to put in it, she does not know what their brief will include; but based on the litigation so far, she believes they plan to continue to exclude all arguments that would tend to benefit any large number of patients.

They have, in fact, gambled everything on the opposite strategy; they argue that so few patients would qualify under a necessity defense as to be insignificant and thereby not in significant conflict with the spirit of the CSA.

That is, Respondents' counsel (who actually are Intervenors' counsel) have chosen to sacrifice the interests of perhaps 99% of OCBC's membership, in hope of improving the chances of the tiny minority they actually represent.

What is most ironic about this is that by refusing to make any arguments that could benefit the entire membership of OCBC, Respondents' counsel have left out the arguments most likely to succeed at all.

For instance, although the new President is on record as believing a state should have the right to legalize medical cannabis, and it is clear from *U.S. v. Lopez* (1995) 514 US 549 and *U.S. v. Morrison* (5/15/2000) ___ US ___ that a majority of this Court believe that the Commerce Clause does not allow federal "police" powers over local activities, Respondents' counsel have barely mentioned states' rights and have not argued a single case in support.

Most notably, they have ignored *Linder v. U.S.* (1925) 268 US 5, the controlling case on the limits of federal power to control practice of medicine within a state, which construed the fore-runner of the CSA as inapplicable to intra-state supplying of a patient with a small quantity of a drug for bona-fide medical purposes.

They also ignore the controlling case on a patient's right to medically-necessary treatment, *Colautti v. Franklin* (1979) 439 US 379, which held that the right to choose such a treatment is even broader than the right to choose abortion; and that physicians must be given broad discretion to decide what is best for their patients' health.

Amicus therefore seeks to argue that the exemption to the injunction should be not just upheld but broadened.

Unless the government has a compelling federal interest in prohibiting medical use of cannabis, then insofar as the CSA is construed to have this effect, it violates patients' and states' constitutional rights as construed by this Court in numerous cases over the past two centuries.

Intervenors deserve to prevail in this case, and would deserve to prevail even if they had something less than a medical "necessity" for cannabis; it should be sufficient to have any bona-fide medical purpose, such as to avoid the need to use more hazardous alternatives (even if the alternatives are not unreasonably hazardous).

(1) *Linder v. U.S.* (1925) 268 US 5 found that the forerunner of the CSA could not bar doctors from supplying small quantities of drugs to patients for bona-fide medical purposes, because Congress lacks the constitutional authority to control the practice of medicine within a state.
U.S. v. Lopez (1995) 514 US 549 held that the cases that expanded Congress' Commerce Clause powers did not alter the rule that Congress has no police power over local acts without a substantial involvement of interstate commerce.

(2) *Roe v. Wade* (1973) 410 US 113 found constitutional protection for the right to choose one medical treatment, abortion, with no need to claim medical-necessity and with no suggestion that the constitution gave abortion any more protection than it gives other medical choices.
Colautti v. Franklin (1979) 439 US 379 extended *Roe* by ruling that even after fetal viability, although there is no longer a general right to choose abortion, physicians must still be allowed broad discretion to provide abortions when they find it to be in the best interest of a patient's health.

(3) *Weems v. U.S.* (1910) 217 US 349 requires dismissal of a charge if the minimum penalty would be excessive and disproportionate to the offense; but supplying cannabis for medical use does no offense to anyone, so any penalty will by definition be excessive and disproportionate.
The *Enmund v. Florida* (1982) 458 US 782 majority held that penalties are unconstitutionally cruel unless based on wrongful intent, while the dissent argued that harm to victims also matters; but those who supply cannabis for medical use neither intend nor cause any harm to anyone.

(4) *Yick Wo v. Hopkins* (1886) 118 US 356 held equal protection includes equal laws without unjust discrimination between those in similar circumstances; but the CSA lets the Attorney General ban natural cannabis yet allow synthetic cannabis and many more dangerous drugs.

School of Magnetic Healing v. McAnnulty (1902) 187 US 94 found that Congress could not have intended such an absurd result as placing an administrative official in charge of deciding the efficacy of medical treatments on which the medical community has divided opinions.

U.S. v. Carolene (1938) 304 US 144 requires voiding a statute that has become irrational due to changes in facts since its enactment; but the CSA was based on there being no significant current medical use of cannabis, and that fact has been reversed since 1970.

There will be no need to decide these issues if the CSA is construed to be inapplicable in the absence of a significant involvement of interstate commerce; or inapplicable if and when there is a significant medical usage of cannabis.

But insofar as the CSA is construed as taking away the right of California to allow medical use of cannabis, it violates states' rights as much as a federal law regulating the practice of medicine within a state.

Also, insofar as the CSA was intended to take away a patient's right to obtain the safest or otherwise best drug for her medical condition, it is as unconstitutional as a law that takes away her right to obtain an abortion.

Further, insofar as the CSA is held to penalize medically necessary acts, or any victimless acts done for bona-fide medical purposes, it is as unconstitutionally cruel as a law that punishes people who have done nothing wrong

And insofar as the CSA authorizes the Attorney General to discriminate against natural cannabis and in favor of synthetic cannabis, it is as unconstitutional as a law that authorizes him to discriminate against small businesses.

The Court should therefore remand the question to the district court to determine what compelling federal interest the government has to balance the patient's and state's.

(1) If Congress could not prohibit intra-state supplying of alcohol until a constitutional amendment was enacted to authorize this, then Congress cannot impose prohibition of a medicine in states that want to allow it, until and unless a constitutional amendment is enacted authorizing that.

Medical cannabis was legal by prescription under state and federal law until the 1970 enactment of the Controlled Substances Act and its state equivalents.

Before 1970 it was well understood that the states had the exclusive right to regulate local medical practice and that federal jurisdiction over medicine only existed if there was an involvement of interstate commerce.

Since 1970 the federal government has taken the position that the CSA authorizes it to imprison any distributors or growers of any quantity of cannabis even for bona-fide medical purposes, no matter how local the activity and no matter how extreme or well-verified the need.

One reason to doubt that Congress intended that result is that such penalties would appear worse than just excessive; they would seem to be simply *purposeless*.

Another reason is that it makes more sense to assume Congress only intended to control acts having a significant impact on interstate commerce, since it had so long been understood that the federal government could not control intra-state medical practices and could not bar doctors from supplying drugs to patients in small amounts for bona-fide medical purposes.

The case most directly on point, *Linder v. U.S.* 268 US 5, which has never been overturned, construed the 1914 Harrison Narcotic Law as not intended to apply to such intra-state activities since the constitutionality of a federal law against such activities would at best be very doubtful:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government.
>
> "And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not

naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

"Obviously, direct control of medical practice in the States is beyond the power of the Federal Government." (*Linder* 268 US at 17-8)

Linder was typical of two centuries of caselaw; from *Gibbons v. Ogden* (1824) 9 Wheat. 1 to *U.S. v. Lopez* (1995) 514 US 549, this court has consistently agreed that Congress' power to regulate commerce "among" the states does not include the power to regulate drug (or any other) commerce occurring entirely within a single state.

Gibbons said Congress has no power over commerce:

"which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States."

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one....

"The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."

"...inspection laws....form a portion of that immense mass of legislation, which embraces every thing within...a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves.

"Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State...are component parts of this mass."

"...quarantine and health laws...are considered as flowing from the acknowledged power of a State, to provide for the health of its citizens." (*Gibbons* at 9 Wheat. 194-5, 203, 205)

Gibbons voided a New York law that granted a monopoly of steamboat traffic in New York waters used for inter-state and foreign shipping. By contrast, *Veazie v. Moor* (1853) 14 How. 568 upheld a similar Maine law, because it applied to a river accessible only to intra-state shipping:

> "...the power vested in Congress by article 1st, section 8th of the Constitution, was not designed to operate upon matters...which are essentially local in their nature and extent." (*Veazie* 14 How. at 574)

The *License Tax Cases* (1866) 5 Wall. 462 upheld a federal tax on sales of liquor and lottery tickets on the ground that it was a tax (and hence was authorized by the Revenue Clause), and not a regulation or prohibition under the Commerce Clause, which would not have been valid:

> "...very different considerations apply to the internal commerce or domestic trade of the States.
>
> "Over this commerce and trade Congress has no power of regulation nor any direct control.
>
> "This power belongs exclusively to the States." (5 Wall. at 470-1)

By contrast, *U.S. v. Dewitt* (1870) 9 Wall. 41 voided a federal law restricting (but not taxing) sale of naphtha and illuminating oils as beyond the constitutional authority over interstate commerce, holding that Congress has no power "to prohibit trade within the limits of a State"; and that the Commerce Clause has always been understood:

> "...as a virtual denial of any power to interfere with the internal trade and business of the separate states..." (*Dewitt* 9 Wall. at 44)

The reason for giving Congress power over interstate commerce was once well-understood, not to create a police power nor a national planned economy, but to prevent the trade barriers that generally existed across national boundaries and that would exist across state boundaries if the states were free to create them:

> "...the object of vesting in Congress the power to regulate commerce...among the States was to

insure uniformity of regulation against conflicting and discriminating State legislation. (*County of Mobile v. Kimball* (1880) 102 US 691 at 697)

"The design and object of that power, as evinced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain." (*Veazie* 14 How. at 574)

Coe v. Errol (1886) 116 US 517 considered the question of when goods first come under the Commerce Clause:

"There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination."

"It is true, it was said in the case of *The Daniel Ball,* 10 Wall. 557, 565: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.'

"But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other." (116 US at 525, 528)

Kidd v. Pearson (1888) 128 US 1 ruled that a state has a right to decide whether sale and manufacture of alcohol were to be prohibited within it, because the federal power to regulate commerce:

"...does not comprehend the purely domestic commerce of a State which is carried on between man and man within a State or between different parts of the same state...".

"If it be held that the [Commerce Clause] includes the regulation of all such manufactures as are in-

tended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing.

"The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining - in short, every branch of human industry." (128 US at 17, 21)

As of 1888, such a conclusion still seemed an absurdity.

The *Lottery Case* (1903) 188 US 321 expanded Congress' Commerce Clause authority to include police powers over perceived threats to public morals, but upheld a federal law against interstate trafficking in lotteries only because it did not attempt to suppress lotteries within a single state:

"...[it] does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States.

"It has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns the people of the United States." (188 US at 357)

Jacobson v. Massachusetts (1905) 197 US 11 upheld the state's right to decide whether to require vaccination:

"The authority of the State to enact this statute is to be referred to what is commonly called the police power - a power which the State did not surrender when becoming a member of the Union under the Constitution.

"...this court...has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States."

"The safety and health of the people of Mass-

achusetts are, in the first instance, for that Commonwealth to guard and protect.

"They are matters that do not ordinarily concern the National Government." (197 US at 25, 38)

The *Employers' Liability Cases* (1908) 207 US 463 was one of many about federal laws protecting workers from extreme exploitation - laws that could be authorized by the 13th Amendment as much as by the Commerce Clause.

As the Court described it at 496, the challenged law involved "regulation of the relation of master and servant" (*i.e.*, employer and employee), and it plainly had a purpose in spirit closer to stopping "involuntary servitude" than to protecting interstate freedom of trade. However, the government did not invoke the 13th Amendment.

Two Justices opined in *dictum* that the Commerce Clause did not authorize such interference in employment matters; they also found the statute invalid because it applied to intra- as well as inter-state commerce, with which three other Justices concurred, making a majority.

Four dissenting Justices wanted to uphold the statute, but only because they construed it as inapplicable to intra-state activities. All nine Justices agreed that Congress had no power over a state's internal commerce. As one put it,

"...I agree that the Congress has not the power directly to regulate the purely internal commerce of the States, and...I understand that to be the opinion of every member of the court." (207 US at 505, Moody, J., dissenting)

Another case with 13th-Amendment implications, *Hoke v. U.S.* (1912) 227 US 308, upheld the White Slave Act ban on interstate transporting of women for immoral purposes as a measure against "enslavement in prostitution".

But again, transportation across state lines was involved:

"Let an article be debased by adulteration, let it be misrepresented by false branding, and Congress may exercise its prohibitive power.

"It may be that Congress could not prohibit the manufacture of the article in a State.

"It may be that Congress could not prohibit in

all of its conditions its sale within a State.
"But Congress may prohibit its transportation between the States, and by that means defeat the motive...of its manufacture." (227 US at 322)

Hammer v. Dagenhart (1917) 247 US 251 went to the extreme of holding that Congress couldn't even control the manufacture of goods intended for interstate commerce:

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation.
"When the commerce begins is determined... by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state."

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.
"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."

"...the commerce power....is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities." (247 US at 272-3, 269)

The Court therefore voided a federal law banning interstate commerce in products of companies that employ child labor below a stated age or in excess of stated hours.

Congress responded by enacting a stiff tax on companies that violate child-labor standards. In the *Child Labor Tax Case* (1922) 259 US 20, the Court voided it, holding that the Revenue Clause, like the Commerce Clause, couldn't be used to give power to Congress over intra-state affairs:

"To give such magic to the word 'tax' would be to break down all constitutional limitation of the

powers of Congress and completely wipe out the sovereignty of the States." (259 US at 38)

Since child labor comes about as close as you can get to "involuntary servitude", and the 13th Amendment clearly overrides state autonomy, it is not clear why the government didn't claim authority under that provision; if they had, later caselaw might have gone very differently.

Lambert v. Yellowley (1926) 272 US 581 upheld a federal law that limited (but didn't prohibit) prescriptions of alcohol for medical use. A four-justice dissent argued:

"Congress...cannot directly restrict the professional judgment of the physician or interfere with its free exercise in the treatment of disease.
"Whatever power exists in that respect belongs to the states exclusively." (*Lambert* 272 US at 598)

The *Lambert* majority at 593, citing *Everard's Breweries v. Day* 265 US 545, acknowledged that Congress generally can't enact such laws, but ruled that the 18th Amendment gave Congress the power to limit prescriptions of alcoholic beverages "although affecting subjects which, but for the Amendment, would be entirely within state control".

The CSA's predecessor was upheld in *U.S. v. Doremus* (1919) 249 US 86 and in *Nigro v. U.S.* (1927) 276 US 332 on the theory that it was a tax, not a prohibition:

"In interpreting the Act, we must assume that it is a taxing measure, for otherwise it would be no law at all.
"If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress and must be regarded as invalid..." (276 US at 341)

Schechter v. U.S. (1935) 295 US 495 unanimously rejected the theory that Congress has authority over everything that affects interstate commerce, since in effect this would mean that Congress had authority over everything, period:

"If the commerce clause were construed to reach all enterprises and transactions which could be said

to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.

"...the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State." (295 US at 546, 550)

Even *NLRB v. Jones & Laughlin Steel* (1937) 301 US 1, which gave an expansive reading to the Commerce Clause, still warned that the limits of Congress' powers:

"...must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them...would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." (301 US at 37)

Santa Cruz Fruit v. NLRB (1938) 303 US 453 also gave the Commerce Clause an expanded reading, but still denied Congress any powers over intra-state commerce with only a remote or insignificant effect on interstate commerce:

"...where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention...

"However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce, but commerce with foreign nations and among the several States." (303 US at 466)

U.S. v. Darby (1941) 312 US 100 further expanded the Commerce Clause, overturning *Hammer v. Dagenhart* and

upholding a federal minimum-wage and maximum-hours law, applied not only to goods shipped interstate but also to the production of a commodity all or part of which is intended for interstate commerce; but *Darby* expanded the Clause only where there is a "**substantial effect on interstate commerce**", 312 US at 119, with no suggestion that this could also apply to purely local, small-scale activities.

Wickard v. Filburn (1942) 317 US 111 gave an even more expansive reading to the Commerce Clause, allowing Congress to limit the size of wheat crops.

But the expansiveness of *Wickard* has often been greatly exaggerated, including by Justice Souter's lead dissent in *U.S. v. Morrison* (2000) ___ US ___, ___, which claims it applied to "**ostensibly domestic, noncommercial farming.**"

Filburn, a commercial farmer, had grown 23 acres of wheat, which was 12 acres more than his allotment under the Agricultural Adjustment Act of 1938. Some of this was for sale and some for feeding his own livestock but almost all of it was grown for purely commercial purposes.

The court held that farms of such size, collectively, had sufficient effect on the national market that Congress could impose a maximum number of acres of wheat per farm.

Thus *Wickard*, one of few rulings allowing Congress so much power over local activities, only concerns crops that are many times larger than a family's annual consumption (even though not large in comparison to other farms). The Court made clear that the Act didn't affect small farms:

> "**Exemption from the applicability of quotas was made in favor of small producers....on which the acreage planted to wheat is not in excess of fifteen acres.**" (317 US at 92).

Wickard did not consider and therefore does not control the case of a patient who grows (or a doctor who supplies) a small quantity sufficient for her own personal needs.

Justice Douglas' dissent in *Maryland v. Wirtz* (1968) 392 US 183 at 204 argued that *Wickard* meant "**All activities affecting commerce, even in the minutest degree...may be regulated and controlled by Congress...**"

The *Wirtz* majority rejected that interpretation:

> "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities..." (392 US at 197 fn 27)

Perez v. U.S. (1970) 402 US 146 gave perhaps the most expansive reading to the Commerce Clause, upholding a federal law against loan-sharking that applied to even the smallest transactions; *Perez* didn't give Congress power over local crime in general but rather only found that Congressional findings justified the conclusion that loan-sharking was controlled by interstate organized crime:

> "It appears...that loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations." (402 US at 146)

In *U.S. v. Bass* (1971) 404 US 336, the Court construed a federal law against felons possessing guns as requiring a showing of connection to interstate commerce:

> "Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress."
>
> "...unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.
> "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." (404 US at 339, 349)

Even after the CSA was enacted, the States have still been understood to be in charge of regulating health within their borders; as *Whalen v. Roe* (1977) 429 US 589 put it:

> "It is...well-settled that the State has broad police

powers in regulating the administration of drugs by the health professions." (429 US at 603, fn. 30)

U.S. v. Rutherford (1979) 442 US 544 upheld a ban on interstate commerce in an unproved cancer drug, Laetrile, rejecting a statutory-construction argument that it was unreasonable if applied to terminally ill patients.

The Court did not consider any constitutional arguments, but still made clear why there was no Commerce Clause or states' rights issue, the ban being only on interstate trade:

"Seventeen States have legalized the prescription and use of Laetrile for cancer treatment within their borders, and similar statutes have been defeated in 14 other States." (442 US at 554, fn. 10)

This Court has not forgotten the reasons for not having a centralized government; it explained them at length just a decade ago in *Gregory v. Ashcroft* (1991) 501 US 452:

"This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry."

"Perhaps the principal benefit of the federalist system is a check on abuses of government power."

"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." (501 US at 458)

Since there is no issue here of failure to pay some tax, nor any issue of importing from outside the country, nor any other apparent basis for federal jurisdiction, it would appear that the government must claim that every time a

patient grows one cannabis plant or even one dose is supplied to her, it has enough indirect effect on interstate commerce that the federal government has jurisdiction.

U.S. v. Lopez went to great lengths to reject that theory. *Lopez* voided a federal law penalizing possession of a gun in a school zone. The dissenters argued that the perceived harmful effects of gun possession in school zones were so severe as to make the question a federal issue, Congress having jurisdiction under the Commerce Clause on the theory that anything so harmful to society as a whole must by definition have some effect on interstate commerce.

The majority denied that the constitutional power to "**regulate Commerce...among the several States**" (Art. 1, ¶8, cl. 3) included power over intra-state activities (which, in *Lopez'* case, weren't even "commerce").

The lead opinion by Chief Justice Rehnquist summarized the history of Supreme Court Commerce Clause jurisprudence and concluded that it has never agreed to such an expansive reading of that clause as would give Congress authority over activities with a very indirect and insubstantial effect on interstate commerce.

The majority's main reasoning was that such a reading would give the federal government police powers over even the most localized (and non-commercial) of activities, which would be redundant to or supersede the state's jurisdiction, and which would mean the Commerce Clause had created a centralized national government with general police powers - which it plainly wasn't meant to do.

> "The Government admits, under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce....
>
> "Similarly, under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens....
>
> "Under the theories that the Government presents ...it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.

"Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." (514 US at 564)

Justice Thomas' concurrence in *Lopez* traces the history of the court's Commerce Clause jurisprudence from the 1700s to 1936, showing that for the first 150 years the clause was understood to differentiate between interstate and intra-state commerce, creating federal jurisdiction over the one but reserving the other to the states.

Justice Thomas believes that even a "substantial effect" on interstate commerce is not sufficient to provide federal jurisdiction, since there are many crimes that indirectly have such an effect but which the Commerce Clause plainly was not intended to create federal jurisdiction over.

"We have said that Congress may regulate not only 'Commerce...among the several States'...but also anything that has a 'substantial effect' on such commerce.

"This test, if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life."

"Although we have supposedly applied the substantial effects test for the past 60 years, we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power." (514 US at 584, Thomas, concurring; emphasis in original)

An even more recent case, *U.S. v. Morrison* (5/15/2000) ___ US ____, rejected the theory that Congress has power over violent crime based on its aggregated effects:

"Given...petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded."

"If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."

"We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.

"The Constitution requires a distinction between what is truly national and what is truly local....

"In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted." (*Morrison* ____ US at ____)

But if Congress has no power to prohibit *violent* local acts such as rape, what power can they have to prohibit *non-violent* local acts such as the practice of medicine?

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So much of the expansion of the Commerce Clause has been for purposes of preventing economic exploitation of those in powerless positions (child-labor, "white slave" traffic, unorganized labor, etc.), that 13th-Amendment "involuntary servitude" issues seem at least as relevant as any theory that interstate commerce is affected.

Morrison, too, can be seen as a 13th-Amendment-related case; it is no stretch to say that rape is a kind of slavery.

But however analysed, the expanded-Commerce-Clause cases mostly involved laws intended to protect someone from crime or exploitation; they are not very relevant precedents regarding whether a state still has the right to control the practice of medicine within its borders.

Other expansions of the Commerce Clause have resulted from cheap transport causing the economy as a whole to become more national; but even if 23-acre farms and loan-sharks of all sizes can be presumed to have an interstate impact, *Linder* has never been overturned as to supplying small amounts of drugs to patients for medical purposes.

There is not just a Commerce Clause issue but also a very strong states' rights issue here, since California has decided it wants medical use of cannabis to be legal here.

States have sometimes been denied the right to prohibit medical treatments, but *Amicus* knows of no case where a state has been denied the right to *allow* a treatment.

States were free to allow abortion even before *Roe v. Wade;* states are now free to allow Laetrile or assisted suicide. Why can't a state allow medical use of cannabis?

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(2) If the constitution protects a woman's right to abort a pregnancy despite the loss of a nascent life, a thing of undisputedly great value, then it must at least equally protect her right to take cannabis to abort a migraine headache attack, a thing of indisputably negative value.

Medically-necessary abortion was already generally if not universally legal, long before *Roe; Roe* recognized not just the rights of a few exceptional patients, but of *all*.

If *Roe* is taken as giving abortion greater protection than most other medical treatments, it would be fair to say that the enacters of the Constitution never intended that.

But it would be more fair to understand *Roe* as holding that the general standards of medical freedom also apply to abortion (despite the valid state interest in the fetus' life).

The right not to be deprived of life, liberty or property without due process, is enough textual support for medical freedom to justify requiring the government to show that it has a compelling interest in banning a medical treatment and that its law is narrowly tailored to serve that interest.

Roe at 410 US 153 gave as one argument for the right to abortion, that it can be safer than full-term pregnancy.

Full-term pregnancy is not unreasonably hazardous for most women, but even a small risk is enough under *Roe* that all women have a right to refuse to bear it.

Amicus has a similar right to choose the safest drug for her condition, even if the other drugs are not unreasona-

bly hazardous, unless the government can show what compelling interest it has in denying her this choice.

If the *Roe* court had considered that child-bearing is also notoriously painful, it might have added that it would be unconstitutionally cruel to punish a woman for refusing to undergo such pain. Likewise, migraines are painful enough that refusal to suffer them can hardly be punishable.

Textual support for a constitutional right to abortion can also be found in the 13th Amendment ban on involuntary servitude. To be forced to bear a child against one's will is a kind of slavery, but it is in principle little different from being forced to bear headache pain or other illness because of an unjustified prohibition of the best available medicine.

The *Roe* court itself held that a woman's right to choose a medical treatment necessary to her life or health is even broader than her general right to choose abortion; that is, even after the fetus is viable (when there is no longer a general right to choose abortion under *Roe*), she still has a right to choose abortion if her health requires it:

> "...subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." (*Roe v. Wade* 410 US at 164-5)

In *U.S. v. Vuitch* (1971) 402 US 62 and again in *Doe v. Bolton* (1973) 410 US 179, this Court upheld the adequacy of medical-necessity exemptions to abortion restrictions; but in *Colautti v. Franklin* (1979) 439 US 379, this Court found such an exemption to be inadequate, explaining:

> "The contested provisions [in *Vuitch* and *Doe*] had been interpreted to allow the physician to make his determination in the light of all attendant circumstances - psychological and emotional as well as physical - that might be relevant to the well-being of the patient.
> "The present statute does not afford broad discretion to the physician." (*Colautti* 439 US at 394)

Thus this Court has not only found a right to choose a medically-needed treatment that is broader than the right to choose abortion, this Court has also found that this must not be a narrow exemption (as in the common-law necessity defense), but rather must allow the physician to have "broad discretion" to consider all factors revelant to the patient's "emotional as well as physical...well-being".

Roe held that, even where there was no significant health hazard to the mother, her right to choose this particular medical treatment was so fundamental that even the state's interest in the fetus' life wasn't enough to outweigh it.

Two justices dissented in *Roe*, as in *Doe*, its companion case; but both dissenters made clear that they would see it differently if the mother's health were at risk:

> "If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective..." (*Roe*, 410 US at 173, Rehnquist, dissenting)

> "It is my view...that the Texas statute is not constitutionally infirm because it denies abortions to those who seek to serve only their convenience rather than to protect their life or health." (*Doe*, 419 US at 222, White, dissenting)

Thus it appears that all nine Justices agreed abortion is constitutionally-protected when medically necessary; why should medically-necessary cannabis be less protected?

There are only two possible inferences:

Either: the Constitution gives abortion such preferred status that a woman has a right to choose it, even after fetal viability, even for mere "emotional...well-being", yet no right to choose cannabis even if her life depends on it.

Or: patients *always* have a right to choose what's best for their health, and no law may take away this right unless narrowly-tailored to serve a compelling interest.

Roe applied the general "strict scrutiny" standard:

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'" (410 US at 155)

This case involves "life" as well as "liberty", but either would be enough to require strict-scrutiny review.

"Liberty" is sometimes taken as meaning the freedoms considered fundamental by Anglo-American common law tradition when the Constitution was enacted.

By this standard, medical use of cannabis is protected, since medical use of all herbs was always legal under the common law. And medically-necessary cannabis is even more protected, since the very existence of a "common-law necessity defense" shows there was a well-established right to disobey laws when needed to avoid a greater evil.

"Liberty" is also sometimes construed in autonomy terms ("...**our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination...**", *Cruzan v. Director* (1990) 497 US 261 at 287, O'Connor, concurring), by which Respondents should likewise prevail.

Neither common law nor the logic of autonomy justifies giving the right to choose to *refuse* a treatment any more protection than the right to choose to *have* it.

Specifically as to medically-necessary treatment, the right to *refuse* lifesaving treatment has been almost universally recognized, while the right to *have* lifesaving treatment has inexplicably not been so well recognized.

Washington v. Glucksberg (1997) 521 US 702 found no right to choose life-ending treatment, based on a long-standing Anglo-American tradition of treating assisted suicide as murder rather than as a "liberty".

But even if "life, liberty and property" don't include a right to death, they at least include a right to "*life*"!

So if patients have a right to *refuse* medically-necessary treatment even to the point of committing (unassisted) suicide, how can their right to *have* medically-necessary treatment – *i.e.*, to choose to *live* – be any less?

Patients must also have a right to choose medication to avoid pain, nausea, blindness or other suffering.

Glucksberg did not decide that issue since Washington's law allowed palliative care (see 521 US at 737, O'Connor, concurring, and 791, Breyer, concurring); but common law decides it, since the medical use of drugs to relieve suffering was never a crime under the common law.

Amicus does not claim that common law or autonomy principles give her absolute freedom of choice over her body or health; only that she has the right to have her medical interests balanced against whatever legitimate counter-interests the government may have.

Jacobson v. Massachusetts (1905) 197 US 11 upheld a compulsory-vaccination law, but agreed that people have a right to challenge the justification for such a law:

> "There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will." (197 US at 29)

If the CSA really was intended to criminalize cannabis even for bona-fide medical use and even when medically necessary, it is as unconstitutional as a law criminalizing medically necessary abortion - unless the government has some legitimate interest, compelling enough to justify the avoidable pain, avoidable nausea and avoidable deaths.

The Court should therefore either construe the CSA as inapplicable to bona-fide medical use of cannabis, or else remand the case for determination of whether the government has a legitimate (federal) interest sufficiently compelling as to outweigh the interests of the patient.

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(3) If the government cannot show a compelling interest in prohibiting medical use of cannabis, then any penalty for supplying it to a patient for bona-fide medical purposes is excessive and disproportionate, and therefore would be unconstitutionally cruel and unusual punishment.

Weems v. U.S. 217 US at 349 held that "**punishment for crime should be...proportioned to the offense**".
But medical use of cannabis does no apparent offense to any known interest, so any penalty for supplying it for medical use is necessarily disproportionate and excessive.

In *Enmund v. California* 458 US at 800 the majority held "**criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing**" or "**moral guilt**".

The dissent argued that in addition to intent, punishment should also be proportionate to the harm done:

> "...**the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness.**" (*Enmund* 458 US at 800, O'Connor dissent)

But there is zero "harm inflicted on the victim" when someone grows or supplies cannabis for medical use.
And as to "intentional wrongdoing", those who supply cannabis for medical purposes have zero "moral guilt".

Therefore, if the government cannot show a legitimate purpose for prohibiting medical use of cannabis, then insofar as the CSA is construed to apply to supplying it for medically-necessary or other bona-fide medical purposes (including self-supply by growing it), any penalty it imposes is excessive and disproportionate, and thus unconstitutionally cruel punishment; and the resulting and intended deprivation of medicine is no less cruel.

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(4) **Even if Congress enacted the CSA based on evidence that there was no significant medical use of cannabis in 1970, it did not authorize the Attorney General to ignore any revival of medical use of cannabis as has occurred, nor to substitute his judgment for that of physicians, nor to unreasonably allow synthetic but not natural cannabis.**

To the extent Congress meant to authorize the Attorney General to discriminate among medicines, the result is reminiscent of the San Francisco ordinance struck down in *Yick Wo v. Hopkins* 118 US 356, whose:

> "tendency...if not...purpose...is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly...to the large institutions established...by...large associated Caucasian capital" (*Yick Wo* 118 US at 362)

The CSA as it has been applied has had the similar "tendency...if not...purpose" of driving out of business the many small producers of natural cannabis, including many non-whites, while giving a monopoly to the "large associated Caucasian capital" corporations that sell the patented competing drugs including the synthetic form of cannabis known as Marinol (= Marijuanaoil) or dronabinol.

Another way the old San Francisco ordinance resembles the CSA as it has been applied, is that both are uncompromising prohibitions rather than reasonable regulations:

> "It does not profess to prescribe regulations ...nor require...precautions and safeguards... nor in any other way attempt to promote their safety and security without destroying their usefulness" *Yick Wo* at 372

And insofar as the CSA empowers the Attorney General to discriminate among medicines, as *Yick Wo* put it:

> "Though the law be fair on its face and impartial in appearance, yet, if it is applied...with...an unequal hand, so as practically to make unjust... discriminations between persons in similar circumstances...the denial is still within the prohibition of the Constitution." *Yick Wo* at 373

Mugler v. Kansas (1887) 123 US 623 upheld a state's right to pursue interests such as "public health" by prohibiting sale of alcohol (the law allowed it for medical use). But at 660 the Court wrote that the "power does not exist with the whole people to control rights that are purely and exclusively private"; and that courts must judge whether privacy rights are violated by a law:

> "It does not at all follow that every statute enacted ostensibly for the promotion of those [public] ends, is to be accepted as a legitimate exertion of the police power of the state....

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects...it is the duty of the courts to so adjudge..." *Mugler* 123 US at 661

Whether there was no significant medical usage of cannabis in 1970 may be debated but is now moot.

Since Congress authorized the Attorney General to reschedule cannabis to allow prescriptions if a medical use developed, it plainly did not consider this impossible.

However reasonable the CSA may have been in 1970, the situation regarding medical use of cannabis has changed; this case is now in this Court only because there has been such an enormous increase in the medical use of cannabis, that California voters felt the need to make it a "right".

> "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (*Carolene* 304 US at 153)

This is not changed by Congress having delegated to the Attorney General the decision whether to recognize that the facts have changed. While it is not clear that Congress even has the power to delegate to the executive branch the decision of what the legal status of a thing shall be, it certainly cannot delegate any power it doesn't have.

Nothing in the CSA justifies the conclusion that Congress intended that the Attorney General have the power to tell physicians whether there is a medical use for cannabis; if that were the purpose, it would have made more sense to give this power to the *Surgeon* General instead.

Rather, Congress may be assumed to have meant it to work the other way around: the physicians would tell the Attorney General if a medical use for cannabis existed, and the Attorney General would just accept their opinion, acting as a mere clerk, not as National Health Commissar.

But insofar as the CSA empowers the Attorney General to decide whether medical use of cannabis is desirable (and

not just whether it is bona-fide medical use), it puts a medical decision in the hands of someone with no medical credentials who, as chief prosecutor, can't be impartial.

And insofar as the CSA gives a Washington bureaucrat with no medical credentials the power to make medication decisions overriding the patient's and her doctor's choices, it is structurally irrational; that is, there is no possible rational basis for thinking the Attorney General is the right person to be making *Amicus'* medical decisions.

The Attorney General's interpretation of the CSA has a remarkably similar historic precedent.

School of Magnetic Healing v. McAnnulty (1902) 187 US 94 concerned a fraud statute that the Postmaster General interpreted as allowing him to ban the School of Magnetic Healing from receiving mail.

The Court thought Congress mustn't have intended this, since it would be absurd to put an official with no relevant credentials in charge of deciding the value of a treatment:

> "It is still in an empirical stage, and enthusiastic believers in it may regard it as entitled to a very high position in therapeutics, while many others may think it absolutely without value or potency in the cure of disease.
>
> "Was this kind of question intended to be submitted for decision to a Postmaster General, and...that he might decide the claim to be a fraud...?
>
> "As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud." (187 US at 105)

If California physicians (and voters) believe cannabis safe and effective for various conditions, equal protection with magnetic healing requires the same decision here.

"Was this kind of question intended to be submitted for decision to [an Attorney] General...?"

There could be no rational basis for giving the Attorney General the power to decide if the medical use of cannabis is bona-fide, nor whether to exclude it from interstate commerce as fraudulent; and even less, to impose his view by controlling the local practice of medicine within a state that has voted to declare medical use of cannabis a "right".

Nor is there any possible rational basis for giving the Attorney General the power to decide that the physicians who recommend cannabis are mistaken; "...the efficacy of any special method is certainly not a matter for the decision of the [Attorney] General..."

While the government shouldn't be allowed to prohibit a medicine without a sufficient compelling interest, it doesn't even have a rational basis for prohibiting physicians from prescribing natural cannabis while allowing prescriptions of synthetic cannabis and other more hazardous drugs.

It also has no rational basis for discriminating against medical cannabis compared with laetrile, which states are free to legalize as many have done (*Rutherford* 442 US at 554 fn. 10); assisted suicide, which states can legalize as Oregon has done (*Glucksberg* 521 US at 709 fn. 7); abortion, which states could legalize even before *Roe;* or alcohol, which states were free to legalize before the 18th Amendment and have been since it was repealed.

Such unequal protection demands explanation.

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CONCLUSION: **The Attorney General's interpretation of the CSA is irrational and constitutionally dubious at best since nothing in the record shows a federal interest sufficient to outweigh the interests of the state or patient.**

Congress anticipated that there might be significant medical usage of cannabis in the future, and therefore authorized the Attorney General to re-schedule it to allow prescriptions if this occurred (as it has).

But nothing in the CSA implies that the Attorney General was authorized to substitute his judgments for those of the medical profession or his will for that of the states.

As he has interpreted it, the CSA authorizes him to control the local practice of medicine in the states, against their wishes; to deny physicians the right to prescribe the medicine they believe best; and to deny patients the medicine that is best for them, even at the cost of their lives.

One reason to doubt that interpretation is that there is no apparent reason why Congress would want to give the Attorney General such power over the practice of medicine or over the internal affairs of a state.

Another reason is that Congress may be assumed to have been aware of *Linder* and other constitutional caselaw, and not to have intended to give the Attorney General powers that Congress itself had already been denied.

If the CSA gives the Attorney General such powers, this Court should remand for consideration of whether there is a sufficient federal interest to outweigh the state's under the Commerce Clause; whether there is a compelling interest to outweigh the patient's under the Due Process Clause; whether the CSA's penalties are cruel and unusual punishment as applied to cannabis for medical use; and whether there is a rational basis for discriminating against medical cannabis compared to other medical treatments.

But the constitutional issues need not be decided if it is assumed that Congress intended that the Attorney General re-schedule cannabis if and when there was a revival of its medical usage; and did not intend to authorize him to substitute his views for that of physicians or states.

In that event, the medical-necessity exemption to the injunction should be affirmed; and the case remanded with instructions to enlarge the exemption to include all physician-approved medical purposes as per *Linder*.

Respectfully submitted February 19, 2001.

Sudi Pebbles Trippet
amicus in pro. per.

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ACTING SOLICITOR GENERAL'S CONSENT TO FILING:

U.S. Department of Justice
Office of the Solicitor General
Washington D.C. 20530

February 15, 2001

Also via telefax 707-937-3160

Pebbles Trippet
Box 338
Albion Ca 95410

Re: United States v. Oakland Cannabis Buyer's Cooperative et al., No. 00-151

Dear Ms. Trippet,

As requested in your letter of February 14, 2001, I hereby consent to the filing of a brief amicus curiae on behalf of Sudi Pebbles Trippet in the above-styled case.

Sincerely,

Barbara D. Underwood
Acting Solicitor General

cc: William K. Suter, Esquire
Clerk
Supreme Court of the United States
Washington D.C. 20543

PROPOSITION 215 (HEALTH & SAFETY CODE 11362.5)

SECTION 1. Section 11362.5 is added to the Health & Safety Code to read:

11362.5 (a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b) (1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this act shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or be denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary care-giver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary care-giver" means the individual designated by the person exempted under this act who has consistently assumed responsibility for the housing, health, or safety of that person.

SECTION 2. If any provision of this measure or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the measure which can be given effect without the invalid provision or application, and to this end, the provisions of this measure are severable.